IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 58 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DILIP CHINUBHAI SHAH

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR RK PATEL for Petitioner

MR AKIL QURESHI for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 26/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the assessee, the Income Tax Appellate Tribunal, Ahmedabad Bench 'B', has referred to this Court the following question of law arising out of its order passed in ITA No.2007/Ahd/84 under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

"Whether, on the facts and in the circumstances of the case, the capital gains of Rs. 34,425/- was liable to be included in the total income of the assessee?"

2. The facts giving rise to the reference, in a nutshell, are as under :

2.1 Shri Chinubhai Motilal Shah, who died intestate on 20.2.1965, was survived by his three daughters, four sons and a widow. After his death, one of his properties, a residential house situated at Panchvati, Ellisbridge, Ahmedabad, devolved upon his 4 sons. By executing a memorandum/deed dated 27.3.73, the said property was given to Hindu Undivided Families of the 4 sons. Though the said residential house was not partitioned by metes and bounds, as per the said memorandum, with effect from 26.3.73, Hindu Undivided Families of the 4 sons had acquired equal share in the said property.

2.2 Four sons of late Shri Chinubhai, namely, Jitendrabhai, Surendrabhai, Dilipbhai and Bharatbhai, as Kartas of their respective Hindu Undivided Families, had filed their returns after execution of the memorandum dated 27.3.73 and in the returns of their HUFs, their respective share of income from property arising from the said property had also been shown. Thus, though there was no partition by metes and bounds, share of each HUF had been determined by virtue of the memorandum dated 27.3.73.

2.3 During the Assessment Year 1979-80, two of the families disposed of their rights in the said property in favour of other two families by executing sale deeds dated 7.7.78. Thus, during the previous year ending on 31.3.1979, two families ceased to be joint owners in respect of the said property whereas families of two brothers became joint owners of enhanced shares in the said property.

2.4 It is pertinent to note that the said deed dated 7.7.78 was captioned as "partition deed of the property".

The value of the property was estimated at Rs. 3 lacs and by virtue of the said deed, HUFs of Shri Jitendrabhai and Surendrabhai purchased shares of HUFs of Shri Dilipbhai and Shri Bharatbhai. Payments were made on the basis that value of the property was Rs. 3,00,000/-.

2.5 We are concerned with the HUF of Shri Dilipbhai Chinubhai Shah in this reference. As stated hereinabove, Dilipbhai Chinubhai Shah HUF received a sum of Rs. 75,000/- in pursuance of the so-called "partition deed of the property" dated 7.7.78. By virtue of the said deed, 1/4th share of the said property, which belonged to Shri Dilipbhai Chinubhai Shah HUF, was disposed of in favour of the HUF of Shri Surendrabhai.

2.6 The applicant-assessee - Shri Dilipbhai Chinubhai Shah HUF, filed its return for the A.Y. 1979-80 wherein it was stated that its right in the property in question was relinquished by the assessee and the assessee had received a sum of Rs. 75,000/- by way of consideration from HUF of Shri Surendrabhai. An exemption was also claimed in respect of the capital gains as the assessee HUF had constructed a property but as we are not concerned with the said exemption, we need not deal with the same. The assessee had stated in the return that as per the provisions of sec. 47(ii) of the Act, there was no transfer within the meaning of sec. 45 of the Act because in fact, upon dissolution of a body of individuals or an association of persons, the capital asset - the residential house, had been distributed among the brothers and hence no tax was required to be paid on the said amount. The said argument did not find favour with the Assessing Officer and the Assessing Officer held that there was a sale in respect of share of the HUF in the property and according to him there was a capital gain to the extent of Rs. 34,425/- and he assessed the assessee accordingly. The assessee therefore filed an appeal before the AAC. The AAC upheld the order of the Assessing Officer whereby a sum of Rs. 34,425/was included in the income of the applicant-assessee by way of capital gains.

2.7 Being aggrieved by the order of the AAC, the assessee preferred an appeal before the Tribunal. The Tribunal dismissed the appeal and in the circumstances, at the instance of the assessee, the reference has been made under the provisions of sec. 256(1) of the Act.

3. Learned advocate Shri R.K. Patel appearing for the assessee has submitted that looking to the provisions of sec. 47(ii), no transfer had been effected in respect

of the property in question in pursuance of the deed dated 7.7.78, which was captioned as "partition deed of the property". It has been submitted by him that as the property in question, namely, the residential building, was partitioned in pursuance of the deed dated 7th July 78, the property was distributed among 4 different body of individuals, namely, 4 different families and, therefore, there was no transfer within the meaning of sec. 45 of the Act and therefore there was no income under the head 'capital gains'.

4. On the other hand, learned advocate Shri Akil Qureshi appearing for the revenue has submitted that the case of the assessee has not been covered under the provisions of sec. 47(ii) of the Act. While supporting the orders passed by the revenue authorities and the Tribunal, he has drawn our attention to the fact that, in fact, there was no partition or distribution of capital asset as submitted by learned advocate Shri R.K. Patel in pursuance of the deed dated 7th July, 1978. As a matter of fact, as per the submission of learned advocate Shri Qureshi, in pursuance of memorandum dated 27.3.73, partition had already been effected with effect from 26.3.73. In pursuance of the said memorandum, families of all the 4 brothers had got their respective share in the said property. He has drawn our attention to the fact that after the property was partitioned under the deed dated 27.3.1973, in the income tax returns filed by all the Kartas of the respective families had shown their share of property income from the said residential house. Thus, right from 26.3.73 HUFs of the four brothers had become owners of their respective share in the property and, therefore, it cannot be said that the partition had taken place on 7th July 78, as submitted by the assessee.

5. It has been submitted by Shri Qureshi that, though the deed dated 7th July 78 was captioned as "partition deed of the property", in fact, the said deed was a deed whereby the assessee had sold its share in the property to the HUF of Shri Jitendrabhai Chinubhai Shah and a sum of Rs. 75,000/- was received by the assessee HUF from the HUF of Jitendrabhai Chinubhai Shah.

6. We have heard the learned advocates at length and have also perused the relevant portion of the deeds referred to hereinabove from the paper-book. Upon perusal of the said deeds and looking to the conduct of the 4 families, it is very clear that the said property had been divided among 4 families under the memorandum dated 27.3.73. It has been stated in the said memorandum that with effect from 26.3.73, the property was

partitioned, though not by metes and bounds, but families of the 4 brothers had got equal share in the said property with effect from that date.

7. It is not in dispute that the assessee had shown its share of income from the said property in its return after the property was partitioned with effect from 26.3.73. Had the property not been partitioned with effect from 26.3.73 in pursuance of the memorandum dated 27.3.73, the assessee HUF would not have shown income arising from the said house property in its returns filed for the assessment years 1974-75 and onwards. This fact clearly denotes that the assessee HUF had got its 1/4th share in the property in pursuance of the memorandum dated 27.3.73 and by virtue of the deed dated 7th July, 78, the assessee had sold its share to the HUF of Shri Jitendra Chinubhai Shah.

8. It is pertinent to note that the said property was not owned by a body of individuals or any association of persons as contended by the learned advocate appearing for the assessee. There was no association of persons or body of individuals as on 7th July, 78 which was the owner of the entire property. As stated hereinabove, four different families were having their distinct share, though not defined by metes and bounds, as on 7th July, 78 and share of the assessee was in fact sold to another HUF on that day.

9. Looking to the above facts and the legal position to the effect that the property was not owned by any body of individuals or association of persons, the assessee, who was the owner of 1/4th share of the said property, and it sold its share on 7th July, 78 and, therefore, the revenue had rightly taxed the amount which was earned by the assessee by way of capital gains.

10. Let us look at the issue from a different angle. It is the case of the assessee that there was an association of persons and the said association of persons was the owner of the property and on 7th July, 78 there was a dissolution of the said association of persons and share in respect of each individual had devolved upon different individuals. Had it been so, 1/4th share of the said property would have devolved upon each brother or HUF of each brother. That is not the case here. In the instant case, by virtue of the deed dated 7th July 78, only two HUFs had remained owners of the said property because two HUFs, including that of the assessee, had sold their shares to the remaining 2 HUFs, who had continued to remain not only owners of their

respective share, but they also had become owners of the shares of the 2 HUFs which had disposed of, by way of sale, their share in favour of the two remaining HUFs. Thus, the submission of the learned advocate appearing for the assessee is not correct, even if we view the issue from this angle.

11. Looking to the facts stated hereinabove, we are in agreement with the order passed by the Tribunal and in our opinion the Tribunal was right in upholding the orders passed by the Assessing Officer and the AAC.

12. In the circumstances, we answer the question in the affirmative i.e. in favour of the revenue and against the assessee.

The reference stands disposed of accordingly with no order as to costs.

(A.R. Dave, J.)

(D.A Mehta, J.)

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